



Office of the Clerk  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
The James R. Browning Courthouse  
95 Seventh Street  
Post Office Box 193939  
San Francisco, California 94119-3939



Cathy A. Catterson  
Clerk of Court

(415) 556-9800

June 13, 2005

Notice and Opportunity for Comment on  
Proposed Amendments to the Circuit Rules

Pursuant to 28 U.S.C. § 2071(b), comments are invited on proposed amendments to the Circuit Rules.

- Circuit Rule 3-3 ..... Preliminary Injunction Appeals
- Circuit Rule 4-1 ..... Counsel in Criminal Appeals
- Circuit Rule 11-1.2 ..... Notice of Reporter Default
- Circuit Rule 39-1.7 ..... Opposition to Request for Attorney Fees

New and/or amended language is in bold print, language to be deleted is noted with stricken lines. Comments should be submitted to Cathy A. Catterson, Clerk of Court/Circuit Court Executive, no later than **July 18, 2005.**

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CIRCUIT RULE 3-3

PRELIMINARY INJUNCTION APPEALS

(a) Every notice of appeal from an interlocutory order (i) granting, continuing, modifying, refusing or dissolving a preliminary injunction or (ii) refusing to dissolve or modify a preliminary injunction shall bear the caption "PRELIMINARY INJUNCTION APPEAL." Immediately upon filing, the notice of appeal must be forwarded by the district court clerk's office to the Court of Appeals clerk's office.

(b) Within 7 calendar days of filing a notice of appeal from an order specified in subparagraph (a), the parties shall arrange for expedited preparation by the district court reporter of all portions of the official transcript of oral proceedings in the district court which the parties desire to be included in the record on appeal. Within 28 days of the docketing in the district court of a notice of appeal from an order specified in subparagraph (a), the appellant shall file an opening brief and excerpts of record. Appellee's brief and any supplemental excerpts of record shall be filed within 28 days of service of

appellant's opening brief. Appellant may file a brief in reply to appellee's brief and any further excerpts within 14 days of service of appellee's brief.

(rev. 12-1-02)

**(c) If a party files a motion to expedite the appeal or a motion to grant or stay the injunction pending appeal, the court, in resolving those motions, may order a schedule for briefing that differs from that described above.**

~~—(c) The principal brief of any party may be accompanied by a separately filed request for oral argument setting forth the reasons why oral argument should be heard and why the appeal should be decided by a merits panel. The request shall not exceed 5 pages.~~

~~—(d) The appeal and any pending motions shall, upon the filing of appellee's brief, be referred to the next available motions/screening panel for disposition. The panel may set a date for oral argument or, pursuant to FRAP 34(a) and Cir. R. 34-4, decide the appeal on the briefs without oral argument. Alternatively, the motions/ screening panel may refer the matter to the next available merits panel for disposition.~~

~~—(e) If a party files a motion to expedite the appeal or a motion to grant or stay an injunction pending appeal, the Court may order a schedule for briefing and/or a procedure for disposition of the appeal that differs from the schedule and procedure set forth in subparagraphs (b) and (d) of this rule.~~  
(eff. 7/95)

Cross References: FRAP 8 and Circuit Rules 27-2, 27-3, Stay or Injunction Pending Appeal; FRAP 10 and Circuit Rules 10-2, 10-3, Record on Appeal; Circuit Rule 30-1, Excerpts of Record; FRAP 34(a) and Circuit Rules 34-3, ~~34-4~~, Priority Cases and ~~Requests for Oral Argument~~.

**Purpose of Amendment:** To eliminate the existing presumption that appeals challenging a preliminary injunction will be decided without oral argument. Retention of subsections (b) and revised subsection (c) ensures that the cases will be accorded priority under 28 U.S.C. § 1657 and Circuit Rule 34-3(3).

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## CIRCUIT RULE 4-1

### COUNSEL IN CRIMINAL APPEALS

This rule applies to appeals in categories of cases listed in 18 U.S.C. § 3006A.

**(a) Continuity of Representation on Appeal**

Counsel in criminal cases, whether retained or appointed by the district court, shall ascertain whether the defendant wishes to appeal and file a notice of appeal upon the defendant's request. Counsel shall continue to represent the defendant on appeal until counsel is relieved and replaced by substitute counsel or by the defendant pro se in accordance with this rule. If counsel was appointed by the district court pursuant to 18 U.S.C. § 3006A and a notice of appeal has been filed, counsel's appointment automatically shall continue on appeal.

**(b) Application for Indigent Status on Appeal**

A person for whom counsel was appointed by the district court under section 3006A of the Criminal Justice Act may appeal to this court without prepayment of fees and costs or security therefor and without filing the affidavit required by 28 U.S.C. § 1915(a).

If the district court did not appoint counsel, but the defendant or petitioner appears to qualify for appointment of counsel on appeal, retained counsel, or the defendant if the defendant proceeded pro se before the district court, shall file on the client's behalf a financial affidavit (CJA Form 23). If the notice of appeal is filed at the time of sentencing, the motions to proceed on appeal in forma pauperis and for appointment of counsel shall be presented to the district court at that time. If the district court finds that appointment of counsel is warranted, the court shall appoint the counsel who represented the defendant in district court, a Criminal Justice Act defender, or a panel attorney to represent the defendant or petitioner on appeal. The district court shall require appointed counsel and the court reporter to prepare the appropriate CJA form for preparation of the reporter's transcript. A copy of the order appointing counsel on appeal shall be sent forthwith by the Clerk of the district court to the Clerk of this court. Substitute counsel shall within seven (7) days of appointment file a notice of appearance in this court.

If the district court declines to appoint counsel on appeal, and if counsel below believes that the district court erred, counsel shall, within fourteen (14) days from the district court's order, file with the Clerk of this court a motion for appointment of counsel accompanied by a financial affidavit (CJA Form 23).

**(c) Withdrawal of Counsel After Filing the Notice of Appeal**

A motion to withdraw as counsel on appeal after the filing of the notice of appeal, where counsel is retained in a criminal case or appointed under the Criminal Justice Act, shall be filed with the Clerk of this court within twenty-one (21) days after the filing of the notice of appeal and shall be accompanied by a statement of reasons **and including:**

(1) A substitution of counsel which indicates that new counsel has been retained to represent defendant; or

(2) **A motion by retained counsel for leave to proceed in forma pauperis and for appointment of counsel under the Criminal Justice Act, supported by a completed financial affidavit (CJA Form 23);**~~The defendant's completed financial affidavit (CJA Form 23) and motion for appointment of counsel under the Criminal Justice Act;~~ or

(3) **A motion by appointed counsel to be relieved and for appointment of substitute counsel;** or ~~An affidavit or signed statement from the defendant stating that the defendant consents to appointed counsel's being relieved and requesting appointment of substitute counsel;~~ or

(4) A motion by defendant to proceed pro se; or

(5) An affidavit or signed statement from the defendant showing that the defendant has been advised of his or her rights with regard to the appeal and expressly stating that the defendant wishes to dismiss the appeal voluntarily.

Any motion filed pursuant to this section ~~not accompanied by defendant's affidavit or signed statement shall set forth the reasons for such omission.~~ **shall be served on defendant; the proof of service shall include defendant's current address.**

(6) Alternatively, if after conscientious review of the record appointed counsel believes the appeal is frivolous, on or before the due date for the opening brief, appointed counsel shall file a separate motion to withdraw and an opening brief that identifies anything in the record that might arguably support the appeal, with citations to the record and applicable legal authority. The motion and brief shall be accompanied by proof of service on defendant. See, Anders v. California, 386 U.S. 738 (1967), and United States v. Griffy, 895 F.2d 561 (9th Cir. 1990). The cover of the opening brief shall state that the brief is being filed pursuant to Anders v. California. The filing of a motion to withdraw as counsel along with a proposed Anders brief serves to vacate the previously established briefing schedule.

To facilitate this Court's independent review of the district court proceedings, counsel shall designate all appropriate reporter's transcripts, including but not limited to complete transcripts for the plea hearing and sentencing hearing, and shall include the transcripts in the excerpts of record. Counsel are advised to consult Ninth Circuit Rule 30-1.

When an appointed attorney has properly moved for leave to withdraw pursuant to Anders and has included all appropriate reporter's transcripts, this Court will establish a briefing schedule permitting the defendant to file a pro se supplemental opening brief raising any issues that defendant wishes to present. The order will also direct appellee by a date certain either to file its answering brief or notify the court by letter that no answering brief will be filed. (New 01/2001)

(d) **Motions for Leave to Proceed Pro Se in Direct Criminal Appeals**

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(e) **Post Appeal Proceedings**

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(f) **Counsel's Claim for Fees and Expenses**

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Cross Reference: FRAP 42, Voluntary Dismissal, FRAP 46(c), Attorneys, Circuit Rule 27-9.1.

**Purpose of Amendment:** To clarify and streamline the procedures for counsel in criminal appeals to withdraw. The amendment deletes the requirement that appointed counsel seeking to be relieved obtain written consent from the client; that requirement has proven to be burdensome to counsel and the client and unhelpful to the court. Counsel is, however, required to serve the client with any motion to withdraw, so the court can be assured the client is aware of the motion.

CIRCUIT RULE 11-1

FILING THE REPORTER'S TRANSCRIPT

**11-1.1 Time for Filing the Reporter's Transcript**

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**11-1.2 Notice of Procedure for Reporter Defaults**

In the event the reporter fails to prepare the transcripts in accordance with the scheduling order issued by the court or within an extension of time granted by this court, appellant shall notify this court of the need to modify the briefing schedule. Such notice shall be filed within **21** ~~14~~ days after the due date for filing of the transcripts. The notice shall indicate when the transcripts were designated, when financial arrangements were made or the voucher was **prepared** ~~approved~~, the dates of hearings for which transcripts have not been prepared and the name of the reporter assigned to those hearings.

**Prior to submitting any notice, appellant shall contact the court reporter and court reporter supervisor in an effort to cause preparation of the transcripts. The notice shall be accompanied by an affidavit or declaration that describes the contacts appellant has made with the reporter and the supervisor. A copy of the notice and affidavit/declaration shall be served on the court reporter supervisor.**

**Purpose of Amendment:** To encourage informal resolution of transcript management issues and promote the district court's participation in resolving such issues. The time limit has been expanded to provide a reasonable opportunity to contact the district court staff.

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CIRCUIT RULE 39-1

COSTS AND ATTORNEYS FEES ON APPEAL

**39-1.7 Opposition to Request for Attorneys Fees**

Any party from whom attorneys fees are requested may file an objection to the request. ~~The objection shall be filed with the Clerk, with proof of service, within 14 days after service of the request. The party seeking fees may file a reply to the objection within 7 days after service of the objection.~~ **The time periods set forth in Federal Rule of Appellate Procedure 27(a)(3)(A) and (4) for responses and replies to motions govern the intervals for filing an objection to the request and reply to an objection.**

**Purpose of Amendment:** To promote internal uniformity of rules of practice by conforming the intervals to object to a request and reply to an objection with the periods for a response to a motion and a reply to a response. The language regarding service is eliminated as superfluous in view of Federal Rule of Appellate Procedure 25(b)'s global service requirement.